

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
FOURTH JUDICIAL DISTRICT AT FAIRBANKS

STATE OF ALASKA,

Plaintiff,

vs.

MITCHELL LEE JOSEPH,

Defendant.

Trial Court Case No. 4TO-18-00068 CR
Court of Appeals No. A-13520

DECISION ON REMAND

This case is on remand from the Alaska Court of Appeals. Joseph was arrested for suspected DUI. The arresting trooper attempted to administer a breath test at the Tok trooper post, but Joseph refused to take the test. The arresting trooper told Joseph that he could be charged with a misdemeanor for refusing to take a breath test when, in fact, he could be, and was, charged and ultimately convicted of a felony refusal.

The court of appeals held that the trooper misadvised Joseph and remanded the case to the superior court to conduct “an evidentiary hearing to determine whether Joseph’s decision to refuse [a] breath test was actually influenced by the trooper’s misadvisement.” Following remand, this court appointed the public defender to represent the defendant. An evidentiary hearing was held on October 31, 2022 at which the defendant and the arresting officer testified. The defendant submitted a transcript of the breath testing audio at the hearing. The State provided the on-scene and breath testing audios on November 2, 2022.

The court finds that Joseph’s decision to refuse the breath test was not influenced by the misadvisement he received.

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Evidentiary Hearing Testimony

Mr. Joseph's and Trooper Will's testimony is reviewed first, followed by a review of Trooper Will's audio at the scene and at the trooper post.

Joseph's Evidentiary Hearing Testimony

Joseph testified that a hitchhiker had been driving the vehicle when the accident occurred and that he started drinking in the woods after the accident. After he was arrested for DUI, he pleaded his innocence. Joseph continued to assert his innocence throughout his arrest.

Joseph had very little present recollection of the advice the trooper gave him. He testified that whatever the trooper said "was pretty much just flowing through" him. (The court understands this statement to mean that Joseph was not really listening to what the trooper said). He does not presently recall being told a refusal would be a misdemeanor, but he now knows he was advised it was a misdemeanor based on his review of the evidence in the case.

Joseph testified that he refused to take the breath test because he was pleading his innocence. He had not been driving the vehicle, so he thought that he should not have to take a breath test if he was not driving the vehicle. He said his present memory of the testing procedure is "blurry," but he thinks the trooper told him a refusal would be a misdemeanor toward the beginning of the testing procedure. He testified that, in 2018, a misdemeanor was not a "big deal" to him. The word "misdemeanor" went "in one ear and out the other" and he would "take a misdemeanor in a heartbeat and not even blink an eye about it." But if he heard the word "felon" or "felony," he might have "stood in his tracks for a second . . . and re-thought [his] choices".

According to Joseph, there was a "big possibility" that being told a refusal would be a felony could have made a difference to him. Hearing the word "felony"

would have perked my ears up; it would have caught my attention,
and I could have made the correct choice . . . for me at the time . . .

whether . . . to submit to a breathalyzer or not. . . . But, people just sitting there and throwing charges at me that are just minor, that's not going to affect me at all really, especially for the person I was back then.¹

On cross-examination, Joseph testified that, based on his prior criminal record (he had two prior felony DUI convictions), he suspected that he would be convicted of a felony if he were found guilty of DUI, although he wasn't sure where he was on "the ten-year mark", which would have made the difference between a felony and misdemeanor. He had not refused to take a breath test before this incident.

On re-direct, Joseph testified that he was not 100 percent sure as to whether he would be charged with a misdemeanor or felony. He reiterated that if the trooper had told him his refusal would be charged as a felony, that advice would have "influenced [him] more" in his decision making than being told the refusal was a misdemeanor. The trooper telling him that a refusal would be a misdemeanor influenced him "to keep going on [his] rights". If he had been told the refusal was a felony, he "probably would have stopped because a felony is a really, really, really big deal."

Trooper Will's Evidentiary Hearing Testimony

Trooper Will testified that Joseph was uncooperative throughout his encounter with him, and that Joseph evinced a complete disregard for anything he had to say.

The drive from the scene of the accident to the Tok trooper post was a 40 to 60-minute trip. Trooper Will testified that Joseph requested a blood draw at Fairbanks Memorial Hospital, approximately a four-hour drive from Tok.

Trooper Will testified that a blood draw could be obtained in Tok. The trooper obtained a search warrant for a blood draw at the Tok clinic, but Joseph refused to allow his blood to be drawn

¹ October 31, 2022 evidentiary hearing audio at 3:13:08—3:13:55 p.m.

even though a search warrant had been issued. Trooper Will decided not to execute the search warrant in order to avoid violence.

On cross-examination, Trooper Will testified that he and the defendant had no conversation about the legal process for obtaining a breath sample until they arrived at the Tok post.

Scene Audio

The court has reviewed Trooper Will's audio at the scene. Approximately eleven minutes into the audio, Joseph asked if he could have a drink. The officer refused to let him drink more, observing that he appeared to have had enough to drink. Joseph said he had not done anything wrong. At approximately 13 minutes, the officer asked Joseph where he was when he picked up the hitchhiker who he said had been driving the truck. Joseph became combative in tone and asked if he "was arrested or what?" The officer told him he was not under arrest. Joseph, again in an aggressive tone, said "So, can I go?" The officer said he was not free to leave. At this point a car pulled up to see if anyone needed help. Joseph asked the driver if he could leave with her. The officer told him he was not free to leave and observed that the car was full of passengers. Joseph said it should be up to the driver as to whether he could ride with her. Just before the car pulled away, Joseph twice asked the officer if he was free to leave and was told he was not. After the car pulled away, Joseph started to walk away from the officer. The officer stopped Joseph and then advised him he was under arrest for DUI.

When he was advised that he was being arrested for DUI, Joseph protested that he had done nothing wrong. He asked why he was under arrest and the officer again told him he was under arrest for DUI. The officer read him his *Miranda* rights. The defendant, at this point, became belligerent and kept asking why he was being arrested and asserted that he had not driven the vehicle.

Tok Post Audio

The court has reviewed both the trooper's audio at the post and the transcript of that audio provided by the defense.

At the Tok trooper post, Joseph was initially cooperative. He advised the trooper that he already had two felony DUIs and that he had been incarcerated for seven years. At about eight minutes into the audio, Joseph complained that he had been arrested for no reason. He challenged whether the officer had seen him exit the vehicle. He complained that, under the equal protection clause, the officer had no probable cause to arrest him. He mentioned the possibility of filing a civil suit. Shortly after, Joseph said he would not be in handcuffs if the troopers had had infrared or heat detecting equipment to track the hitchhiker he claimed had been driving his truck.

When the trooper said he was going to start the Data Master machine and obtain a breath sample—and before he was given any advisement—Joseph said “I decline.” The officer asked the defendant to let him explain how the process works before he declined to give a breath sample. Joseph again responded, “I decline.” The officer reiterated that he would tell him how the process worked and told Joseph he had a right to decline. Joseph, interrupting, again said, “I decline” and asked for a blood draw at “FMH”, a colloquial reference to Fairbanks Memorial Hospital.

The officer told Joseph that he could not obtain a blood draw from FMH because it was too far away. The officer next told Joseph that the machine was going to ask for a breath sample and, if he did not provide one, he would be charged with refusal, which he incorrectly advised Joseph would be “an additional misdemeanor.” Joseph then said he was not refusing, he just wanted a blood draw at FMH. The officer explained that FMH was a four-hour drive and that he could not take him to FMH to obtain a blood draw. At this point, Joseph started arguing that he had not been driving and asked the officer whether he saw him driving. The officer conceded he

did not see Joseph drive the vehicle, but explained that he had circumstantial evidence that he drove. The officer then asked Joseph to stand up. Joseph initially failed to stand up, and again demanded a blood draw. The officer told him a blood draw could be taken by the local medics. The defendant declined an offer to sit back down. The officer said he was going to “get this party started” (*i.e.* start the breath test), and that if Joseph did not wish to provide a sample, he would have to read him some additional paperwork. Joseph again complained that he had not been driving.

The officer again conceded that he had not seen Joseph driving, but advised Joseph, “we’re not gonna argue about it ‘cause it’s not gonna get anywhere tonight.” Joseph then asked why he would provide a breath sample because “when you’re driving behind a vehicle, Alaska state laws, uh, laws, you automatically waive your right to a breathalyzer.” He stated, “So right now, with given laws, I never waived no right to a breathalyzer.” (In the context of their conversation, it appears Joseph believed that the law only required him to give a breath sample if he was driving—or if he was driving behind another vehicle—and that he was not required to provide a breath sample because he had not been driving). The officer said he was not going to discuss the law. Joseph tried to get the officer to agree with him that Joseph’s view of the law was correct. When the officer did not respond, Joseph said, “So, basically, I don’t have to give a breathalyzer ‘cause I wasn’t behind the wheel.” The officer responded, “Okay.” Joseph then asserted that he had “studied the sh__ out of the law So the breathalyzer’s not gonna happen, because there’s no right for it to happen, first of all.” The officer again told Joseph that if he did not wish to provide a breath sample, he needed to read something to him and then, if he still did not wish to provide a breath sample, “then we’ll just move on.” Joseph responded “There’s no reason to.” (In context, Joseph meant there was no reason to provide a breath sample because the law did not require one

to be provided). Joseph again complained that he had been arrested for nothing, was sitting in the trooper post for no reason, and asked if everything he said was being recorded. He was assured a recording was being made and Joseph responded, “So from the very beginning I’m being arrested for no reason at all.”

The officer then offered Joseph the opportunity to provide a breath sample and Joseph said, “I don’t need to provide a sample.” The officer responded, “Okay. So are you gonna give a sample of your breath?” Joseph responded, “There is no sample to give.” The officer offered to let Joseph “think about it, and then if you still don’t want to --”; Joseph interrupted and said, “There is none.” The officer told Joseph that he would read the “paperwork” to him. Joseph said he wanted to call his attorney immediately. The officer told him he could not call his attorney immediately because it would interfere with the breath testing (which had already started). Joseph then reiterated his understanding of the law, as described above.

When Joseph refused to provide a sample, the officer allowed the testing machine to time-out and then read Joseph the advisement concerning providing a breath sample, which correctly advised Joseph that refusing to provide a breath sample “is a crime that will result in mandatory jail time, a mandatory fine, and loss of your driving privileges.” After reading the advisement form to Joseph, the officer and Joseph engaged in the following exchange:

TROOPER WILL: So have had those – having had me read this to you, are you still not willing to provide a sample of your breath or do you want to provide a sample of your breath? And mind you, based on your history, it may be a misdemeanor or it could be a felony, so that’s something to think about, too. So if you just let me know if you want to provide a sample of your breath or not[.] --²

² The inflection of the officer’s voice on the audio establishes that the officer ended his sentence. He was not interrupted by Joseph, as implied in the transcript.

MR. JOSEPH: So what is the reason for me providing a sample of my breath is what I'm asking.³

TROOPER WILL: To measure the alcohol level in your –

MR. JOSEPH: For what reason?

TROOPER WILL: -- in your breath. For – for operating your motor vehicle, okay?

MR. JOSEPH: I wasn't operating a motor vehicle in the first place.

TROOPER WILL: I know you tell me that, but that – we're already past that.

MR. JOSEPH: Why do I have to – I don't have to then.

TROOPER WILL: So are you gonna –

MR. JOSEPH: So you said the reason for operating a motor vehicle and I wasn't operating a motor vehicle, so I don't have to. That's basically common sense.

TROOPER WILL: So are you gonna provide a sample [yes or no] –⁴

MR. JOSEPH: Did you see me operating a motor vehicle?

TROOPER WILL: Are you gonna provide a sample of your breath, [or not]?⁵

MR. JOSEPH: Did you see me operating a motor vehicle?

TROOPER WILL: Okay, so what I'm gonna do is I'm gonna start this up again give you another opportunity to provide a sample of your breath.

MR. JOSEPH: I wasn't operating a motor vehicle.

³ Review of the audio establishes that Joseph made this statement immediately after Trooper Will spoke, and with no indication of hesitation in his voice.

⁴ Based on the court's review of the audio, the officer stated the words in brackets.

⁵ Based on court's review of the audio, the officer stated the words in brackets, but did not state "yes or no."

TROOPER WILL: Okay.

MR. JOSEPH: And you already said on record, no, you didn't [see Joseph drive], so there's no reason to blow (unintelligible) after (unintelligible).

TROOPER WILL: Okay.

MR. JOSEPH: Don't make no sense to me. . . .⁶

Following this exchange, the officer offered Joseph a second opportunity to provide a breath sample and Joseph again refused to provide a sample in the following exchange:

MR. JOSEPH: There is no reason to provide a sample of my breath. I wasn't behind no vehicle.

TROOPER WILL: Okay.

MR. JOSEPH: I mean, behind it – the vehicle you automatically waive your right to a breathalyzer. I wasn't behind a vehicle, so I have the right to deny a breathalyzer.

TROOPER WILL: Mm, I'm pretty sure the state doesn't see it that way.

MR. JOSEPH: That's how it is. Like, there's no reason for a breathalyzer.

TROOPER WILL: Okay.

MR. JOSEPH: I'm legal to drink if I wanna drink.

TROOPER WILL: You're right. You're over 21.⁷

After this exchange, the officer asked Joseph if he still wanted his blood drawn. Joseph said there was "no reason for it." The officer started to read Joseph a blood draw advisement, Joseph interrupted asking, "Did you see me drivin'?" Ultimately, Joseph refused a blood draw and refused to cooperate when the officer tried to execute a search warrant for a blood draw.

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⁶ Tr. 26, line 21—28, line 15.

⁷ Tr. 29, line 12—30, line 1.

Joseph's Decision to Refuse to Submit to a Breath Test Was Not Influenced by the Trooper's Misadvisement that His Refusal Would Be a Misdemeanor.

Mr. Joseph testified that a proper advisement would probably have made a difference in his decision to refuse to provide a breath sample on the night he was arrested. This testimony was not credible for three reasons.

First, Joseph testified that he was not really listening to what the officer was telling him when he was at the trooper post.

Second, Joseph repeatedly declined to provide a breath sample no matter what the officer advised him. When Joseph was first advised that he would be asked to give a breath sample *before* he was misadvised that a refusal would result in a misdemeanor charge, he thrice said he would decline to give a sample. Thereafter, Joseph refused to provide a breath sample when he was told he would be charged with a “misdemeanor”, when he was later told he would be charged with a “crime,” and when, later still, he was told his refusal might be a “felony.”

As to the latter advisement, Joseph was told that he might be charged with a felony based on his criminal history,⁸ and the officer further advised him that the possibility of a felony charge was “something to think about.”⁹ Contrary to Joseph’s testimony, this advisement did not cause Joseph to pause and ponder his options. Instead, he immediately (and without hesitation) refused to provide a breath sample. Although Joseph knew that a felony conviction could result in years of incarceration,¹⁰ the officer’s warning that he might be charged with a felony had no effect on his decision.

Third, each time Joseph was asked to give a sample, he gave the same reason for refusing—because he did not believe that the law required him to provide a breath sample if he

⁸ Tr. 27, line 1.

⁹ Tr. 27, line 1-2.

¹⁰ Tr. 6, lines 22-25.

had not been driving, or had not been driving behind another vehicle. Regardless of the possible consequences for refusing that he was advised of, Joseph refused to provide a breath sample because he did not believe the law required him to submit to testing.

The court finds that Mr. Joseph did not refuse to provide a breath sample in whole or in part because he thought he would only be charged with a misdemeanor. He refused to provide a breath sample because he firmly, but mistakenly, believed the law did not require him to give a sample.

Conclusion

The court finds that Trooper Will's misadvisement did not influence Joseph's decision to refuse to give a breath sample.

DATED: January 19, 2023



PAUL R. LYLE
Superior Court Judge

I certify that on 1/19/23
copies of this form were sent to
Appeals Clerk, DA, PD
Clerk _____

(BP)